Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	ET Docket No. 04-295
Communications Assistance for Law Enforcement Act and Broadband Access And Services	)	RM-10865

To: The Commission

REPLY COMMENTS OF SOUTHERN LINC

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Dated: December 21, 2004

EXECUTIVE SUMMARY

Southern Communications Services, Inc. d/b/a Southern LINC ("Southern LINC") recognizes and supports the importance of assisting law enforcement in the conduct of lawful electronic surveillance to investigate and prevent crime and potential terrorist activities, and it supports the law enforcement community's efforts to that end. Southern LINC also recognizes the difficulties faced by law enforcement in carrying out authorized surveillance in light of evolving communications technologies. While it appreciates the need of the law enforcement community to maintain appropriate surveillance and investigatory capabilities, Southern LINC believes that these issues should be addressed directly by Congress, rather than by straining the interpretation of the existing CALEA statute.

Southern LINC is also concerned that many of the proposals put forth in this proceeding will result in substantial additional cost and regulatory burdens being placed on the shoulders of carriers, with a significantly disproportionate impact on smaller carriers. For this reason, Southern LINC is especially concerned over the ability of smaller carriers to recover their costs for implementing CALEA solutions on their networks and systems. Southern LINC is also concerned over the potential impact of the Commission's proposals regarding CALEA enforcement, the development and use of technical standards, and the use of "trusted third parties" as a means of achieving CALEA compliance.

Southern LINC therefore urges the Commission to ensure that any actions or decisions it adopts as a result of this proceeding provide carriers with sufficient flexibility to be able to implement CALEA's capability requirements in a timely and effective manner and in a way that is appropriate for a given carrier's status or situation.

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SOUTHERN LINC

Southern Communications Services, Inc. d/b/a Southern LINC ("Southern LINC") hereby submits its Reply Comments in response to the Commission's Notice of Proposed Rulemaking and Declaratory Ruling regarding the Commission's proposals to extend the Communications Assistance for Law Enforcement Act ("CALEA") to certain Voice over Internet Protocol ("VoIP") and broadband Internet access services and to revise the CALEA implementation and enforcement regime.[1]

Southern LINC recognizes and supports the importance of assisting law enforcement in the conduct of lawful electronic surveillance to investigate and prevent crime and potential terrorist activities, and it supports the law enforcement community's efforts to that end. Southern LINC also recognizes the difficulties faced by law enforcement in carrying out authorized surveillance in light of evolving communications technologies. While it appreciates

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[1] / *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 04-187 (rel. August 9, 2004) ("*NPRM*").

the need of the law enforcement community to maintain appropriate surveillance and investigatory capabilities, Southern LINC believes that these issues should be addressed directly by Congress, rather than by straining the interpretation of the CALEA statute in hopes of arriving at an expeditious conclusion. The issues raised in this proceeding are complex, both legally and technically, and a rush to force a resolution of them within the current proceeding will only result in even greater uncertainty and ambiguity.

Southern LINC is also concerned that many of the proposals put forth in this proceeding, both in the *NPRM* and by certain commenters, will result in substantial additional cost and regulatory burdens being placed on the shoulders of carriers, with a significantly disproportionate impact on smaller carriers. For this reason, Southern LINC is especially concerned over the ability of smaller carriers to recover their costs for implementing CALEA solutions on their networks and systems.

Southern LINC therefore urges the Commission to ensure that any actions or decisions it should adopt as a result of this proceeding provide carriers with sufficient flexibility to be able to implement CALEA's capability requirements in a timely and effective manner and in a way that is appropriate for a given carrier's status or situation.

I. INTRODUCTION

Southern LINC is a wholly owned subsidiary of Southern Company, which is a registered holding company under the Public Utility Holding Company Act of 1935. As a Commercial Mobile Radio Service ("CMRS") provider, Southern LINC operates a digital 800 MHz SMR system using Motorola's proprietary Integrated Digital Enhanced Network technology to provide dispatch, interconnected voice, Internet access, and data transmission services over the same handset.

Southern LINC provides these services to more than 275,000 subscribers in a 127,000 square mile service territory covering Georgia, Alabama, southeastern Mississippi, and the panhandle of Florida. Southern LINC offers the most comprehensive geographic coverage of any mobile wireless service provider in Alabama and Georgia, serving the extensive rural territory within its footprint as well as major metropolitan areas and highway corridors. Furthermore, Southern LINC serves many areas of Florida and Mississippi that are not served by any other advanced wireless dispatch provider.

II. EXPANSION OF THE SCOPE OF CALEA

Southern LINC appreciates the important policy reasons for extending CALEA to VoIP and broadband Internet access services, but it takes no position in these reply comments regarding whether such an expansion should occur. However, like many commenters in this proceeding, Southern LINC is concerned that the proposals set forth in this *NPRM* are not the appropriate means for accomplishing the desired policy objectives.

Specifically, Southern LINC believes that the Commission's proposed interpretation of Section 102 of CALEA impermissibly stretches the scope of the statute far beyond what Congress intended. Southern LINC agrees with those parties who think that the Commission's approach to the "Substantial Replacement Provision" would effectively allow the Commission to declare any service to be subject to CALEA with only minimal (at best) analysis or investigation, contrary to Congress' intent.[2] The idea that a service is covered by CALEA as a "substantial replacement" because it *could* replace *any* portion of *an individual's* local telephone exchange

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[2] / *See, e.g.,* Comments of BellSouth Corporation ("BellSouth"); Joint Comments of Industry and Public Interest (*including* 8x8, Inc., Center for Democracy & Technology, CompTel/ASCENT, Computer and Communications Industry Association, Information Technology Association of America, *and others*).

service – including dial-up Internet access – simply cannot be reconciled with Congress' clear statement that an entity may be covered "to the extent that [it] serves a replacement for the local telephone service to a substantial portion of the public within a state."[3] Even in the most sparsely-populated states, it is difficult to conclude that an individual subscriber represents "a substantial portion of the public."

In addition, as many parties have pointed out, the plain language of the statute itself expressly excludes information services from the scope of CALEA. Contrary to the Commission's tentative conclusion in the *NPRM*, there is no "irreconcilable tension" between the information services exclusion and the Substantial Replacement Provision.[4] The very last word of Section 102(8)(B)(ii), also known as the Substantial Replacement Provision, is "*but,*" followed immediately by Section 102(8)(C), which states "does *not* include (i) persons or entities insofar as they are engaged in providing information services" (emphasis added). Therefore, even if an entity satisfies the criteria of the Substantial Replacement Provision, it is not included in the scope of entities covered by CALEA to the extent it provides information services. To interpret these provisions any other way is to ignore the plain language of the statute.[5]

As stated above, Southern LINC is not attempting to address in these reply comments the question of *whether* the scope of CALEA should be expanded. Rather, Southern LINC is concerned that the Commission's proposed method for achieving this goal requires accepting interpretations and conclusions that would effectively render much of the statutory language of

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[3] / H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N., 3489, 3500-3501 (1994) ("*House Report*").

[4] / *See, e.g.*, Comments of BellSouth; Comments of Nextel Communications, Inc. ("Nextel"); Comments of the United States Internet Service Provider Association ("USISPA").

[5] / *See, e.g.*, Comments of the Cellular Telecommunications and Internet Association ("CTIA"); Comments of Nextel; Comments of USISPA; Comments of BellSouth.

CALEA meaningless and would call into question whether there are other provisions of this or other statutes that can no longer be relied upon, since they too may be rendered meaningless in much the same way.

Therefore, if the scope of CALEA should be expanded to include VoIP, broadband Internet access, or other services, that expansion should be undertaken by Congress and Congress alone. To the extent that the current language of CALEA is imprecise or inadequate in this regard, Southern LINC agrees with the position of many who believe that it is the responsibility of Congress to provide the necessary clarification and certainty.[6]

III. CALEA IMPLEMENTATION FOR NEWLY-IDENTIFIED SERVICES

The Commission has received a broad range of proposals in response to its question as to the appropriate timeframe for service providers to implement CALEA solutions for services that are newly-identified by the Commission as subject to CALEA. Southern LINC believes that careful analysis is required before a "new service" is deemed covered by CALEA, and accordingly, new services should not be presumed to be subject to the statute.

As a Tier III wireless carrier, Southern LINC has firsthand experience through the E911 implementation process of the unique difficulties and challenges involved in developing and deploying new, often untested, technologies in order to meet specific regulatory obligations. These challenges are particularly acute for smaller carriers who lack the size and resources necessary either to develop solutions in-house or to persuade vendors and manufacturers to address their needs in a timely fashion.

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[6] / *See* Comments of the Electronic Frontier Foundation ("EFF"); Comments of CTIA; Joint Comments of Industry and Public Interest. *See also* Comments of SBC Communications ("SBC") at fn. 18.

To the extent any new service is found to be subject to CALEA, Southern LINC submits that a period of two years from the effective date of any order identifying a service as subject to CALEA provides a reasonable amount of time for service providers, manufacturers, and law enforcement to work together to develop and deploy effective, reliable solutions and technologies. As BellSouth noted in its comments, Congress considered two years to be a reasonable implementation period when it established the guidelines in Section 107 of CALEA for granting extensions.[7]

As many commenters have pointed out, any time period adopted by the Commission should also be sufficiently flexible to allow for the time necessary to address issues such as the type of call identifying information (CII) that may or may not be "reasonably available" through the identified service and/or technology, as well as the time needed to develop, design, manufacture, adequately test, and install appropriate solutions and equipment.[8]

In addition, the Commission should ensure that it addresses the circumstances faced by smaller or regional carriers in setting any implementation deadlines. As stated above, smaller carriers lack the size or the resources necessary to develop and deploy solutions in-house and must rely instead on equipment manufacturers and vendors. However, these manufacturers and vendors are, understandably, almost entirely occupied with meeting the needs of large carriers that purchase far greater amounts of equipment and software and which provide the vendors with the bulk of their revenues. Smaller carriers are left with little option but to adopt a technology or solution already developed by the large carriers (assuming the large carrier does not consider the

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[7] / Comments of BellSouth at 29.

[8] / *See, e.g.,* Comments of BellSouth; Comments of SBC; Comments of the Unites States Telecom Association ("USTA"); Comments of the Telecommunications Industry Association ("TIA"); Comments of the National Cable & Telecommunications Association ("NCTA").

technology or solution to be proprietary and is willing to make it available in the first place), and even then they typically must wait until the large carriers' needs have been fully met before anything becomes available. This lack of market power leaves smaller carriers almost wholly dependent on the development and deployment schedules of third parties over whom they have little or no influence.

During the wireless E911 implementation process, the Commission recognized the dilemma faced by smaller carriers and established staggered implementation deadlines based on carrier size, as counted by the number of subscribers. This staggered schedule has been very successful and has enabled many small regional Tier III carriers to make E911 services available to areas and subscribers that may not have been able to receive them otherwise.

The Commission should likewise establish a similar staggered implementation schedule for CALEA that would afford smaller carriers additional time to obtain and deploy CALEA solutions. Such an approach would give smaller carriers the certainty that they will be able to obtain and deploy effective CALEA solutions without the risk of enforcement action. Further, any additional time granted to smaller carriers would have no real impact on the ability of law enforcement to conduct electronic surveillance, given the low number of surveillance requests that most small carriers receive (often one a year or even fewer).[9]

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[9] / *See, e.g.,* Comments of the Rural Telecommunications Group, Inc. ("RTG") at 5; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 3; Comments of the Rural Telecommunications Providers ("RTP") at 7.

IV. COST RECOVERY

As the Commission is well aware, the costs of implementing a CALEA solution can be substantial and can represent a significant economic and operational burden for carriers. However, CALEA costs have a disproportionately high impact on smaller carriers who have fewer customers over whom to spread these costs. As several smaller and rural commenters noted, the cost of making a single switch CALEA-compliant is the same regardless of whether that switch serves 4,000 subscribers or 400,000 subscribers, thus saddling smaller carriers with a cost per subscriber that can be over 100 times greater than the cost per subscriber for larger carriers.[10] As a result, in order to become CALEA-compliant, smaller carriers must commit a far greater percentage of their operating budget than larger carriers, yet are far less likely to be able to recover those costs. Therefore, Southern LINC urges the Commission to provide carriers with as much flexibility as possible in determining how they recover their costs for implementing CALEA solutions on their networks and systems.

First, carriers should have the option to recover at least a portion of their costs through line item charges on subscriber bills, and carriers should have the flexibility to determine the amount they charge under the line item. Although a nationwide "flat rate" may seem attractive, such a flat rate would not appropriately account for the wide variety in carrier cost structures and subscriber bases that exist throughout the country and would effectively discriminate against smaller carriers by preventing them from recovering any meaningful percentage of their costs. As discussed above, a small carrier must still pay the same amount to upgrade its switch as a

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[10] / Comments of RTG at 5, 7; *See also* Comments of RTP at 8; Comments of the National Telecommunications Cooperative Association ("NTCA") at 11.

large carrier, yet would recover the flat rate from as few as 1% of the number of subscribers as the large carrier recovers from.

For these reasons, the amount of the line item should be within the discretion of the carrier. To the extent there may be any concern that this would give carriers *carte blanche* to charge excessively high rates under this line item, Southern LINC submits that most carriers, particularly wireless carriers, currently operate under significant competitive pressure, and the prospect of losing subscribers over rates would act as an effective check against any possible abuse.

In addition, some commenters have proposed that the Commission address the cost issue for small and rural carriers by establishing a national fund that would be used to assist these carriers with their implementation costs.[11] They propose that such a program could be funded through a nationwide flat rate that carriers collect from their subscribers and pass along to a central fund administrator. While it has a certain appeal, Southern LINC believes that such a program would be neither realistic nor practical. Similar programs have already been implemented on a state basis in many states in order to fund the deployment of E911 services, yet wireless carriers entitled to reimbursement under these programs have, in some states, received few, if any, disbursements from these funds.[12]

Finally, it is essential that carriers be able to recover all of their reasonable costs for assisting law enforcement in the conduct of authorized electronic surveillance activities. Despite the assertions of the Department of Justice (DoJ), these costs clearly include a portion of the cost

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[11] / *See, e.g.*, Comments of the Rural Cellular Association.

[12] / Even in cases where Congress earmarked funds for carriers' cost recovery (*e.g.*, the allocation under Section 110 of CALEA for pre-1995 equipment and facilities), many eligible carriers have yet to receive any reimbursement for CALEA compliance costs.

of the equipment that enables surveillance to occur in the first place. As numerous commenters pointed out, nothing in CALEA changes or alters 18 U.S.C. § 2518(4), which states that carriers shall be compensated "for reasonable expenses incurred" in providing facilities or assistance for the conduct of authorized electronic surveillance.[13]

DoJ now argues that a distinction must be drawn between what it calls "CALEA capital costs" (*i.e.*, the cost of the hardware and software needed to make a network or system CALEA-compliant) and "intercept provisioning costs,"[14] yet nowhere does such a distinction appear in CALEA or in Title 18 or any other federal or state wiretap statute. In addition, Congress clearly understood when it adopted CALEA that the cost of assisting with a specific surveillance request includes certain costs related to the equipment used, and it expected that this practice would continue.[15] DoJ also fails to provide any examples of what it considers to be an "intercept provisioning cost," other than to assert what it is not – *i.e.*, a "CALEA capital cost."

In fact, the only restriction placed on carriers by *any* statute regarding how they determine their provisioning charges is that their costs must be "reasonable." Any determination as to whether a carrier's provisioning charge is reasonable is a rate issue that, for carriers whose rates are regulated, falls under the exclusive jurisdiction of the Joint Board or the relevant state public utility regulator. Questions regarding the reasonableness of a non-rate regulated carrier's

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[13] / *See, e.g.*, Comments of SBC; Comments of TIA; Comments of Nextel; Comments of CTIA; Comments of Motorola, Inc.; Comments of Level 3 Communications ("Level 3"); Comments of Cingular Wireless LLC ("Cingular").

[14] / Comments of the U.S. Department of Justice ("DoJ") at 87 – 94.

[15] / "The Committee intends that 2518(4) [and] 3124 [of Title 18], and 1805(b) [of Title 50] will continue to be applied, as they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines." *House Report* at 3500.

expenses are matters to be decided by the courts under Title 18 or other relevant federal or state statutes.

In any event, it has long been well-established that the rates carriers charge for providing various services – even for "specialized" services such as wiretap provisioning – may reasonably include a cost for recovering some portion of the carrier's capital, a paradigm that in fact exists for all providers of products or services in any sector. This was well-known and understood when Congress adopted Section 2518 of Title 18 in 1968 and when it adopted CALEA in 1994, and there is no evidence in either the statute or the legislative history that Congress intended Section 109 or any other provision of CALEA to serve as a "carve-out" to this paradigm.

Southern LINC would never be able to recover its full CALEA implementation costs through provisioning charges, given the number of surveillance requests it has received over the years. Nevertheless, Southern LINC and other carriers should still be able to recover at least a portion of these costs, provided the amount recovered is reasonable.

V. REVISIONS TO THE CURRENT CALEA REGULATORY SCHEME

Finally, Southern LINC would like to briefly address certain additional issues that have been raised in this proceeding.

A. Enforcement

Southern LINC does not agree with the Commission's proposal to grant itself the power to directly enforce CALEA compliance. As many commenters have stated, and as the plain language of the statute makes clear, Congress intended that enforcement of the CALEA compliance requirements is the sole responsibility of the federal courts.[16] The fact that DoJ has

[16] / *See, e.g.,* Comments of SBC; Comments of BellSouth; Comments of Verizon; Comments of USTA; Comments of CTIA; Comments of Nextel; Comments of T-Mobile; Comments of Motorola; Comments of TIA; Joint Comments of Industry and Public Interest.

never chosen to use the enforcement scheme explicitly set forth by Congress ten years ago does not warrant the establishment of a separate enforcement regime under the auspices of the Commission, particularly a regime that does not include the same protections and restraints that Congress saw fit to impose on the courts in Section 108.

B. Technical Standards and "Safe Harbors"

Southern LINC agrees with DoJ and other commenters that this proceeding is not the appropriate forum for deciding the complex technical issues concerning specific industry standards and their availability as "safe harbors" under CALEA. This inquiry can and should be handled on a case-by-case, fact-specific basis and is best addressed by the existing deficiency petition process.[17]

Southern LINC also agrees that the Commission should not place restrictions on which entities may serve as standards-development bodies. Southern LINC was an active participant in the American Mobile Telecommunications Association (AMTA) working group that developed a CALEA standard for digital dispatch services. In its initial comments in this proceeding, DoJ commended AMTA for having done "an admirable job of setting CALEA standards" even though it is neither affiliated with nor accredited by the American National Standards Institute (ANSI).[18] By maintaining flexibility regarding the types of organizations that may develop a technical standard, the Commission will ensure that innovative and effective CALEA solutions will continue to be developed and deployed as technology continues to evolve.

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[17] / *See* Comments of DoJ at 39 – 43; *See also* Comments of SBC; Comments of Motorola.

[18] / Comments of DoJ at 54 – 55.

C. Use of "Trusted Third Parties"

Southern LINC would like to voice qualified support for the idea of allowing carriers to meet their CALEA obligations through the use of "trusted third parties." Trusted third parties may offer effective options for some carriers to meet their compliance obligations. While permitting their use may be beneficial in some instances, the use of third parties should not be made mandatory, and the existence of a trusted third party should not be a factor in any Commission determination regarding whether compliance is "reasonably achievable" or whether call identifying information is "reasonably available" for a given carrier or service just because a third party states it is willing to provide it for a price. The use of a trusted third party could be cost prohibitive for many carriers, especially for smaller and rural carriers that receive only infrequent surveillance requests (since third party service fees typically assume an anticipated level of activity).

Southern LINC is also concerned with liability and privacy issues related to the use of a third party. These third parties are themselves not subject to either CALEA or to the Commission's jurisdiction, and yet they would potentially have access to sensitive customer information such as call content. This possible liability exposure for carriers may not be offset by the other benefits of using a third party.

VI. CONCLUSION

Southern LINC continues to support the need to assist law enforcement in the conduct of lawful electronic surveillance in order to prevent crime and potential terrorist activities, as well as the need to address the difficulties presented by rapidly-evolving communications technologies. However, Southern LINC believes that these are issues for Congress to decide.

Southern LINC also urges the Commission to ensure that carriers are able to recover their legitimate costs related to CALEA implementation and the provisioning of law enforcement

surveillance requests. Finally, Southern LINC urges the Commission to bear in mind the unique concerns and circumstances of smaller carriers as it moves forward in this proceeding and to ensure that any actions or decisions that the Commission may undertake do not impose a disproportionate burden on such carriers.

Respectfully submitted,

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